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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 545

LAURIE J. CARPENTER,

Petitioner,

—v.—

ERIE RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinion Below

No opinion was delivered by the United States District Court for the Southern District of New York. The opinion of the United States Court of Appeals for the Second Circuit has not been as yet reported. The decision was dated December 29, 1949, the case bearing Docket No. 21460. The opinion reads as follows:

> "The trial judge necessarily dismissed the complaint. The plaintiff had previously asserted his claim in an action brought in the District Court for the District

of New Jersey which was decided against him by the Court of Appeals for the Third Circuit, 132 F. 2d 362, cert. den. 318 U. S. 788. He again asserted his claim in the Southern District of New York and lost on appeal to this Court in a decision reported at 170 F. 2d 73, cert. den. 336 U. S. 904.

The accident for which plaintiff seeks recovery occurred on June 12, 1928. Both of the earlier actions were held barred by the statute of limitations. He is precluded from recovery in the present suit under the rule of *res judicata*. He makes the further argument that he is entitled to recover under Section 1125 (a), Title 15 U. S. C., of the Trademark Law, but that section is applicable to no such circumstances as those alleged in support of his claims. It is entirely evident that his claims are all barred and have been decided against him at various times. His continued reassertion of them can never justify a recovery.

Judgment affirmed."

Statute Involved

Section 56 of the Federal Employers' Liability Act (45 U. S. C. §56), as in effect on June 12, 1928, provided:

> "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued."

The period of limitations was subsequently extended from two to three years by Act of August 11, 1939, Ch. 685, §2, 52 Stat. 1404.

Statement of the Case

This is an action commenced on July 27, 1949 under the Federal Employers' Liability Act to recover damages for an injury to plaintiff's foot alleged to have been sustained on June 12, 1928 (R. 21-25). Defendant moved for summary judgment upon the ground that the action was barred by the statute of limitations and that the issue of limitations was already *res adjudicata* between the parties (R. 13-A). The motion was granted and the complaint was dismissed (R. 3-A). The Court of Appeals affirmed (R. 46).

This is the fifth and latest of a series of actions brought by plaintiff against defendant on the same claim in various jurisdictions. In one of the previous actions, which was in the United States District Court for the Southern District of New York on December 27, 1934, the complaint alleged that the cause of action remained in existence "also on account of a condition of insane poor and former attempt" (R. 37).

In all these actions the plaintiff has maintained that he sustained on June 12, 1928 certain injuries to his foot (R. 30). In the action started in 1934 defendant moved for judgment dismissing the complaint. This motion was granted with an opinion by Judge Caffey, dated February 2, 1935 (R. 14-A). In this opinion the Court pointed out that the accident occurred on June 12, 1928 and that the action was commenced on December 28, 1934 and that under the two-year statute (45 U. S. C., §56) the complaint should be dismissed. An order dismissing the action was duly entered.

As appears from Judge Caffey's opinion (R. 14-A) a still earlier action had been brought by plaintiff against defendant in the Supreme Court of New Jersey, which resulted in a non-suit on September 29, 1932.

As appears from the opinion in *Carpenter* v. *Erie RR. Co.*, 132 F. 2d 363 (C. A. 3rd, 1942), cert. den. 318 U. S. 788, still another action was brought by plaintiff in the United States District Court for the District of New Jersey subsequent to Judge Caffey's decision. A dismissal, upon the ground of limitations, of the action brought in the District Court of New Jersey was affirmed by the Court of Appeals for the Third Circuit and plaintiff's petition for certiorari was denied by this Court on April 12, 1943.

This issue has been before the Supreme Court as recently as the October Term 1948. At that time certiorari was denied in a decision reported in 336 U. S. 904.

In the instant case the Court of Appeals for the Second Circuit used the following language:

> "The trial Judge necessarily dismissed the complaint * * *. It is evident that his (plaintiff's) claims are all barred and have been decided against him at various times. His continued reassertion of them can never justify a recovery."

ARGUMENT

The decision below was clearly correct.

A cause of action under the Federal Employers' Liability Act accrues on the date of the accident and the period within which suit must be commenced runs from that date. *Reading* v. *Koons*, 271 U. S. 58, 62 (1926).

Since it affirmatively appeared from the face of the complaint that the instant action was not commenced until some twenty years after the accrual of plaintiff's cause of action, it was required to be dismissed and defendant's motion for summary judgment was properly granted. *Carpenter* v. *Erie R. Co.*, 132 F. (2d) 362, cert. den. 318 U. S. 788. See also *Carpenter* v. *Erie R. Co.*, 170 Fed. (2d) 73, cert. den. 336 U. S. 904.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent.

J. ROGER CARROLL
Of Counsel.

New York, N Y., February 6, 1950